In the Supreme Court of the United States

October Term, 1978
No. 78-559

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,
Respondent.

GORDON McDOWELL and MRS. PATSY D. McDOWELL,
Real Parties in Interest.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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INDEX

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES **DEPT. 88A**

DATE April 10, 1978

HONORABLE JUDGE Jess Whitehill

HONORABLE JUDGE PRO TEM

Deputy Sheriff None

v. Washington

DEPUTY CLERK

Reporter

(Parties and counsel checked if present)

C 219263
Gordon McDowell and Mrs. Patsy McDowell
vs.
Southern Pacific Transportation Company, a corporation, et al

Counsel for Plaintiff Gerber, Sokoloff & Van Dyke In

Counsel for Defendant LaFollette, Johnson, Schroeter, & DeHaas for So. Pacific Trans. C by G. Prater

NATURE OF PROCEEDINGS

Demurrer of defendant Southern Pacific Transportation Company, a corporation to the third and fourth cause of action of the first amended complaint (Submitted)

In this matter, heretofore Submitted on April 5, 1978, the Court now makes the following ruling:

Demurrers are overruled as to the Third and Fourth Causes of Action.

30 days to file and serve Answer.

Plaintiffs are to give notice.

(A copy of this Minute Order is sent by U.S. Mail to counsel indicated above.)

☐ IT IS STIPULATED that Commissioner may hear this matter as Judge Pro Tem

☐ TRANSFERRED TO FROM DEPARTMENT ☐ Court disqualifies itself ☐ 170.6 CCP affidavit filed

☐ OFF CALENDAR ☐ On court's own motion ☐ No Appearance ☐ At request of moving party ☐ By stipulation

☐ CONTINUED TO IN DEPT AT AM PM

☐ On court's own motion ☐ Stip. to be filed ☐ On oral/written stipulation
☐ REQUEST OF ☐ Moving party ☐ Respondent(s)
☐ TRO to remain in full force and effect ☐ TRO dissolved

☐ NOTICE ☐ Waived ☐ By moving party ☐ By respondent(s)

☐ PETITIONER(S) IS/ARE SWORN AND TESTIFIES/TESTIFY

☐ PETITION IS GRANTED (AS AMENDED) ☐ DECREE IS SIGNED AND FILED

Dept. 88A

MINUTES ENTERED
April 10, 1978
COUNTY CLERK

APPENDIX A

Los Angeles, Cal. JUN 8 - 1970, 19

TITLE { So. Pac. Transportation Co. vs. Superior Court L.A.CO. } *No.* 53635

THE COURT: Petition for writ of mandate and prohibition denied.

CLAY ROBBINS, *Clerk*

APPENDIX B

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

Jul 5 - 1978

I have this day filed Order

HEARING DENIED

In re: 2 Civ. *No.* 53635

Southern Pacific Transportation Company

vs.

Superior Court, Los Angeles

Respectfully,

G. E. BISHEL
Clerk

57371 827 1-78 3M OSI

APPENDIX C

Defendant
SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Corporation

GORDON McDOWELL and
MRS. PATSY D. McDOWELL,

Plaintiffs

vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
a Corporation, et al

Defendants

No. C 219263

DEMURRER OF DEFENDANT, SOUTHERN PACIFIC TRANSPORTATION COMPANY, TO THIRD AND FOURTH CAUSES OF ACTION OF THE FIRST AMENDED COMPLAINT

Date: April 5, 1978
Time: 9:00 a.m.
Dept. 83

COMES NOW defendant, SOUTHERN PACIFIC TRANSPORTATION COMPANY, a corporation, for itself alone, and demurs to the Third and Fourth Causes of Action of the First Amended Complaint of plaintiff, MRS. PATSY D. McDOWELL, on file herein, and for grounds of demurrer, alleges as follows:

1. That the Third and Fourth Causes of Action of the First Amended Complaint fail to allege facts sufficient to state a cause of action on behalf of plaintiff, MRS. PATSY D. McDOWELL, against this defendant.

APPENDIX D

WHEREFORE, defendant, SOUTHERN PACIFIC TRANSPORTATION COMPANY, prays that the Demurrer to the Third and Fourth Causes of Action be sustained without leave to amend.

DATED: March 23, 1978.

LA FOLLETTE, JOHNSON, SCHROETER & DEHAAS

By _____
Gabriele M. Prater
Attorneys for Defendant
SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Corporation

POINTS AND AUTHORITIES

I
BACKGROUND

It is alleged that plaintiff, GORDON McDOWELL, suffered injury while engaged in the regular course and scope of employment with SOUTHERN PACIFIC TRANSPORTATION COMPANY, defendant herein, due to the negligence of certain agents of defendant.

On November 4, 1977, suit was filed against this defendant under the Federal Employers' Liability Act. In the original Complaint, a cause of action for loss of consortium was alleged on behalf of plaintiff PATSY D. McDOWELL, the wife of plaintiff GORDON McDOWELL. This defendant demurred to said cause of action on the basis that a loss of consortium action was not permissible under FELA. The Court initially overruled said demurrer.

Upon a rehearing, the Court requested further briefs be submitted regarding the relationship of FELA with the Jones Act under which plaintiffs contended a loss of consortium action existed. After additional briefs on the issue of loss of consortium under the FELA were submitted and said issue was thoroughly treated by both sides to this lawsuit, the Court ruled on March 17, 1978 granting the demurrer. During oral argument the Court stated that after reviewing the issue more closely, the Court was of the opinion that no loss of consortium action is permissible under FELA pursuant to existing law.

Plaintiffs have now filed their First Amended Complaint in which they reiterate their loss of consortium action, plaintiffs' Third and Fourth Causes of Action.

II

THE PARTY AGAINST WHOM A COMPLAINT HAS BEEN FILED MAY OBJECT BY DEMURRER IF THE PLEADING DOES NOT STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION

Code of Civil Procedure, Section 430.10(e).

III

THE FEDERAL EMPLOYERS' LIABILITY ACT SUPERSEDES THE COMMON LAW AND STATE LAWS AND THE REMEDY UNDER THE ACT IS EXCLUSIVE OF ALL OTHERS.

Erie R. Co. v. Winfield, (1917) 244 US 170.
Chicago R.I. & P.R. Co. v. Schendel, (1926) 270 US 611.
Garrett v. Moore-McCormack Company, (1942) 317 US 239.
South Buffalo R. Co. v. Ahern, (1953) 344 US 367.
Davee v. Southern Pacific Co., (1962) 58 Cal.2d 572.
Waller v. Southern Pacific Co. (1967) 66 C.2d 201.
Morse v. Southern Pacific Transportation Co., (1976) 63 CA.3d 128.

IV

LOSS OF CONSORTIUM IS NOT RECOVERABLE UNDER THE FEDERAL EMPLOYERS LIABILITY ACT.

New York Central Railroad Company v. Tonsellito, (1917) 244 U.S. 360.
Jess v. Great Northern Railway Co. (9th Cir. 1968) 401 F.2d 535.
Anderson v. Burlington Northern, Inc., (10th Cir. 1972) 469 F.2nd 288.
Greethurst v. Bethlehem Steel Corporation, (N.D.Ind. 1974) 380 F.Supp. 638.

Spinola v. New York Central R.R., (1969) 305 N.Y.S.2d 437.
Howes v. Baker, (1973) 305 N.E.2d 689.

It is submitted that plaintiffs' Third and Fourth Causes of Action, both for loss of consortium, are not permissible under FELA. It is further submitted that plaintiffs will not be able to amend their Complaint to comply with existing law, as the present attempt to amend demonstrates, since there simply is no cause of action for loss of consortium under the existing construction of FELA. This defendant therefore requests the Honorable Court to grant its Demurrer as to plaintiffs' Third and Fourth Causes of Action, without leave to amend.

Respectfully submitted,

LA FOLLETTE, JOHNSON, SCHROETER & DEHAAS

By_____
Gabriele M. Prater

Attorneys for Defendant
SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Corporation

Defendant
SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Corporation

GORDON McDOWELL and
MRS. PATSY D. McDOWELL,

Plaintiffs

vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Corporation, et al

No. C 219263

SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER

Hearing Date: April 5, 1978
Time: 9:00 A.M.
Department 83

CONGRESS HAS DEFINED THE EXTENT OF A RAILROAD CARRIER'S LIABILITY — WHICH CANNOT BE EXTENDED BY STATE LAW.

Both the Supreme Court of the United States and of California have decided that the Federal Employers' Liability Act by its terms and as interpreted by federal courts defines the exclusive remedies available against railroad carriers. The California Supreme Court in *Davee v. Southern Pacific Co.* (1962) 58 C.2d 572, 576, stated:

> "By the Federal Employers' Liability Act, Congress took possession of the field of employers' liability to employees in interstate transportation by rail; and all state laws upon that subject were superseded."

A distinction plaintiffs fail to perceive is that FELA does not only extend rights to injured employees but also controls the *extent of liability* railroad carriers are subject to.

This precise issue was treated by the United States Supreme Court in the classic case of *New York Central & Hudson River Railroad v. Tonsellito*, (1917) 244 U.S. 360, in which the father of a minor injured railroad employee sought recovery for loss of the son's services.

As in the present case, plaintiff in *Tonsellito* based his alleged right of recovery on an independent cause of action existing under common law, which he asserted was not extinguished by FELA. The Court disagreed as follows:

> "The court of errors and appeals ruled, and it is now maintained, that the right of action asserted by the father existed at common law and was not taken away by the Federal Employers' Liability Act. But the contrary view, we think, is clearly settled by our recent opinions in New York C. etc. R. Co. v. Winfield, 244 U.S. 147, 61 L. ed. -, 37 Sup. Ct. Rep. 546, and Erie R. Co. v. Winfield, 244 U.S. 170, 61 L. ed.-, 37 Sup. Ct. Rep. 556 (decided May 21, 1917). *There we held the act "is comprehensive and also exclusive" in respect of a railroad's liability for injuries suffered by its employees while engaging in interstate commerce.* "It establishes a rule or regulation which is intended to operate uniformly in all the states as respects interstate commerce, and in that field it is both paramount and exclusive." *Congress having declared*

> *when, how far, and to whom carriers shall be liable on account of accidents in the specified class, such liability can neither be extended nor abridged by common or statutory laws of the state.*
> (Emphasis added).

The *Tonsellito* decision clearly sets forth that actions by a relative of the injured railroad employee for loss of services and society are precluded *even if they are alleged as independent causes of action.* This interpretation of FELA has been strictly followed as in *Anderson v. Burlington Northern, Inc.* (10th Cir.1972) 469 F.2d 288, and in *Jess v. Great Northern Railway Co.,* (9th Cir.1968) 401 F.2d 535. In *Jess*, the wife not only alleged an independent cause of action for loss of consortium, as plaintiffs do here, but brought a separate, subsequent action against the railroad. The Court struck down such cause of action reiterating the principles of *Tonsellito:*

> "The Federal Employers' Liability Act not only provides exclusive remedy for recovery by an employee of damages sustained by him as a result of an injury to him, *but also governs recovery by others for damages resulting from such injury."*
> (Emphasis added).

Plaintiffs rely on the case of *Hitaffer v. Argone,* (1950) 183 F.2d 811, which permittted a loss of consortium action to be brought under a Workers' Compensation statute whose exclusionary language appeared to prohibit such action. The *Hitaffer* case was expressly overruled in *Smither & Co. v. Coles,* (1957) 242 F.2d 220, 221. In overruling *Hitaffer,* the Court expressed its reasoning as follows at page 223:

> *"The 'exclusive nature' of legislation delimiting an employer's liability has been consistently stressed by the Supreme Court.* Such federal acts have been interpreted as pre-empting similar rights arising under state workmen's compensation laws, *and also barring common-law rights of action.* (Citing *Tonsellito.*)" (emphasis added.)

The Court proceeded to answer the wife's assertion that her cause of action was independent and therefore not barred by the Statute.

> "Whether the right of a spouse be regarded as independent, i.e. arising directly from the tort, or as derivative, that *right does not come into existence except for the occurrence of the injury.* Absent a compensable injury to the one spouse there would be no claim to assert against the employer. *In that sense certainly the "rights" are not independent of but derive from or are on account of a compensable injury to the employee."*
> (Page 225; emphasis added).

However, as the Court continued, it is immaterial whether or not the wife's right is independent or derivative, since under the statutory scheme of such statutes "all the rights of husband or wife are merged into the exclusive remedy provided by the Act".

Plaintiffs further maintain that FELA contains no language restricting the carrier's liability. That position is untenable in light of the United States Supreme Court's interpretation of the statute in *Tonsellito,* as well as in light of the words of the statute itself which reads:

> "Every common carrier by railroad. . . shall be *liable* in damages *to any person suffering injury* while he is employed by such carrier in such commerce, *or,* in case of death of such employee, *to his or her personal representative. . . "*
> *45 USC 51*

It is clear by the language of the statute itself that a carrier's liability extends *to the injured employee* or, in case of death, to *his personal representative only.* If Congress had intended to provide independent remedies for the injured's spouse or relatives it could have done so. It should be remembered that FELA grants the injured employee remedies far greater than those available to him under State Workers' Compensation laws.

Plaintiffs' reliance on *Rodriguez v. Bethlehem Steel Corporation,* (12 C.3d 382) is misplaced and in fact totally inappropriate since that case addresses itself to none of the issues present here. Defendant has never contended that there is no loss of consortium under California law.

It is respectfully submitted that based on the language of the Federal Employers' Liability Act itself, as well as on its interpretations by the United States Supreme Court and Appellate Courts, said Act defines the extent of liability of railroad carriers where injury was suffered by an employee and that this definition precludes a loss of consortium action albeit asserted as an independent cause of action. In short, under existing law, no loss of consortium action is possible where the injury arose under circumstances covered by the Federal Employers' Liability Act.

DATED: April 4, 1978.

Respectfully submitted,

LA FOLLETTE, JOHNSON, SCHROETER
& DEHAAS

By _____
Gabriele M. Prater
Attorneys for Defendant
SOUTHERN PACIFIC TRANSPORTATION
COMPANY, a Corporation

Defendant
SOUTHERN PACIFIC TRANSPORTATION
COMPANY, a Corporation

GORDON McDOWELL and
MRS. PATSY D. McDOWELL,

Plaintiffs

vs.

SOUTHERN PACIFIC
TRANSPORTATION COMPANY,
a Corporation, et al

No. C 219263

SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES RE F.E.L.A., JONES ACT AND LOSS OF CONSORTIUM IN SUPPORT OF THE DEMURRER TO PLAINTIFF'S THIRD CAUSE OF ACTION

I

F.E.L.A. IS NOT INCORPORATED INTO THE JONES ACT WHERE ITS INCORPORATION WOULD HAVE THE EFFECT OF RESTRICTING REMEDIES AVAILABLE TO SEAMEN UNDER GENERAL MARITIME LAW.

The Jones Act states that "all" "statutes relating to personal injuries of railroad employees shall apply to seamen's actions under the Jones Act. The United States Supreme Court has steadily construed this to mean that the provisions of the Federal Employers' Liability Act apply to the Jones Act actions where their application appears *reasonable* and where it *does not* narrow rights

granted seamen by the maritime law.

The Jones Act was designed to *expand* seamen's rights in those areas where *general maritime law* does not provide a remedy — it is never applied where it would cut off a remedy available under a construction of maritime law.

The United States Supreme Court addressed this issue in *Cox v. Roth,* 348 U.S. 207 (1955) in which Justice Clark concluded that the Jones Act, by providing that a seaman should have the same rights of action as would a railroad employee, does not mean that "the very words of the F.E.L.A. must be lifted bodily from their context and applied mechanically to the specific facts of maritime events. . . . Rather, it means that those contingencies against which Congress has provided to ensure recovery to railroad employees should also be met in the admiralty setting."

In construing the Jones Act shortly after its enactment, Justice Stone stated in the case of *Panama Railroad Company v. Johnson,* 264 U.S. 375 (1923) that the Jones Act merely added new remedies to the maritime law and was not an attempt to create an exclusive common law remedy for general maritime torts. The Statute interposes no obstacle to "rights founded on the *maritime law or an admissible modification thereof.*" (at p. 388) [Emphasis added]

In the subsequent cases of *Arizona v. Anelich,* 298 U.S. 110, 56 S.Ct. 707 (1936); and *Beadle v. Spencer,* 298 U.S. 124, 56 S.Ct. 712, the Court indicated that everything in the Federal Employers' Liability Act is incorporated in the Jones Act unless the incorporation would *narrow* the rights granted seamen by the *maritime law.*

In *Arizona v. Anelich, supra,* the Court indicated that the essence of the Jones Act was "remedial, for the benefit and protection of seamen. . . . its purpose was to enlarge

their protection; not to narrow it." (at pg. 123)

The following cases illustrate how the Jones Act is used to supplement but never to restrict maritime remedies:

1. Survivorship of actions is held to exist under the Jones Act "in spite of the general admiralty rule against survivorship." *Cox v. Roth, supra,* at p. 210;

2. Although no wrongful death actions could be had under *maritime law*, it exists under the Jones Act. *Lindgren v. U.S., 281 U.S. 38 (1930)*

3. Application of the defense F.E.L.A. provides for a limited application of the defense of "assumption of risk." Since said defense had never been recognized under maritime law, F.E.L.A. is *not applied* — application here would narrow the protection given seamen. *Arizona v. Anelich, supra.*

4. F.E.L.A. provides for recovery only where negligence is shown. Under *maritime law*, "unseaworthiness," without negligence is a cause of action. F.E.L.A. is *not applied* to limit actions under the Jones Act to negligence actions; as such, actions based on "unseaworthiness" are fully compensable under the Jones Act. *Panama Railroad Company v. Johnson, supra.*

In addition to the policy reason of protection of seamen underlying the Jones Act, F.E.L.A. is not applied to narrow seamen's remedies because actions based on maritime torts are *constitutionally based* and mere legislation, even if federal, may not override such constitutionally based remedies. This was recognized in the case of *Panama Railroad Co., supra,* in which the Court, in order to save the Jones Act from "grave" constitutional objections decided that the Jones Act merely added a new remedy to existing Maritime Law. F.E.L.A. may, of course, limit remedies available to railroad employees under common law or state law because federal law

supercedes state law.

II

THE DECISIONS GRANTING A CAUSE OF ACTION IN MARITIME CASES ARE BASED ON A CONSTRUCTION OF GENERAL MARITIME LAW *NOT* THE JONES ACT.

The cases cited by plaintiffs in support of their proposition that a loss of consortium action is available under F.E.L.A., in fact hold that a loss of consortium action is available under *general maritime law.*

Plaintiffs primarily rely on *Sealand Services, Inc. v. Gaudet,* 414 U.S. 573 (1974). It is not disputed that the Court in that case recognized a wife's loss of consortium action, but it did so based on its construction of *general maritime law not* of the Jones Act. The Court reasoned as follows: " . . . in any event our decision is compelled if we are to shape the remedy to comport with the humanitarian policy of the *maritime law* to show 'special solicitude' for those who are injured within its jurisdiction." (at p. 578) [Emphasis added.]

The case of *Skidmore v. Grueninger,* 506 F.2d 716 (1975) correctly interpreted the *Sealand* decision as permitting loss of consortium under *general maritime law.* It did not interpret *Sealand* as admitting loss of consortium under the Jones Act. It did not interpret *Sealand* as admitting loss of consortium under F.E.L.A.

In the case of *Pesce v. Summa Corp.,* 54 CA. 3d 86 (1975) on which plaintiffs heavily rely, the Court permitted the spouse of an injured longshoreman recovery under *general maritime law* for loss of consortium of her husband caused by the negligence of the shipowner. (See plaintiff's further Points and Authorities, page 2, lines 31-35.)

Any recovery which the spouse was permitted to make in the *Pesce* decision was under the terms of the

general maritime law. Nowhere in the *Pesce* decision does the Court place reliance on the terms of the Jones Act or F.E.L.A. as a means of permitting the spouse to maintain her cause of action for loss of consortium.

Equally, in the 1976 case of *Lemon v. Bank Lines,* Ltd., 411 F. Supp. 677 the " . . . basis for plaintiff's action for loss of consortium was *maritime tort which [is] constitutionally based . . .*" (Emphasis added.) The Court ruled that the "spouse of injured longshoreman may recover under *general maritime law* for loss of consortium of her husband caused by negligence of the shipowner." The Court stated, in no uncertain terms, that the spouse of the injured longshoreman was permitted recovery, "under the General Maritime Law." Nowhere in that decision does the Court purport to rule that recovery for loss of consortium is permitted under the Jones Act or the F.E.L.A.

The cases cited above, upon which plaintiffs rely, represent a construction of *general maritime law* and *not* of the Jones Act. Their relevancy, therefore, to cases involving railroad employees who sue under F.E.L.A. is non-existent.

Plaintiffs have failed to cite this Court to a single authority granting a loss of consortium action under a construction of the Jones Act, let alone F.E.L.A. In fact, the only case actually involving the issue before the Court cited in plaintiff's Memorandum of Points and Authiritites is *Jess v. Great Northern Railway Company,* 401 F.2d 535. That 1968 Ninth Circuit U.S. Court of Appeal case *denied* the wife of a railroad employee recovery under the Federal Employers' Liability Act for loss of consortium. The Court held that the Federal Employers' Liability Act not only provides the exclusive remedy for the recovery by an employee of damages sustained by him as the result of an injury to him, *but also governs the recovery by others* for damages resulting from such injury."

That decision is not affected by *Sealand, Skidmore, Pesce, Lemon* nor by any other decision granting loss of consortium under *maritime law.* Those cases simply do not construe the Jones Act nor, by implication, F.E.L.A.

It follows that the case of *New York Central Railroad Co. v. Tonsellito,* 244 U.S. 360 (1917) which interpreted F.E.L.A. as providing exclusive remedies to railroad employees, has not been overruled. The Ninth Circuit Court of Appeals relied on that case in its decision in *Jess, supra. Tonsellito* continues to be the controlling authority on the issue of exclusivity of remedies under F.E.L.A. and is binding on this Court.

Igneri v. Cie. de Transports Oceaniques, 323 F.2d 257 (1963) is overruled by *Sealand, Skidmore,* and *Lemon* only in that it should not have used the Jones Act to disallow a remedy available to seamen under a construction of *pre-statutory maritime law.* It is *not* overruled on the issue of construction of the Jones Act.

III
CONCLUSION

Congress alone possesses the powers to create or alter federal legislation. It has chosen to incorporate into the Jones Act the provisions of F.E.L.A. which prescribe exclusive remedies. The crux is, however, that the Jones Act is not the exclusive source of remedies available to injured seamen and for constitutional reasons may not be used as such — remedies available under pre-existing *maritime law* and admissible modifications thereof coexist. Therefore, a cause of action granted seamen under *General Maritime Law,* as here, loss of consortium, has no bearing on the construction of FELA.

The Jones Act is not the exclusie remedy available to injured seamen; FELA *is* the exclusive remedy available to injured railroad employees.

Respectfully submitted,

LA FOLLETTE, JOHNSON, SCHROETER
& DEHAAS

By_____
Gabriele M. Prater

Attorneys for Defendant
SOUTHERN PACIFIC TRANSPORTATION
COMPANY, a Corporation

2 Civ. 53635

In the Court of Appeal of the State of California

SECOND APPELLATE DISTRICT

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Petitioner,

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Respondent,

GORDON McDOWELL and
MRS. PATSY D. McDOWELL,

Real Parties in Interest.

PETITION FOR WRIT OF MANDATE, OR IN THE ALTERNATIVE, A WRIT OF PROHIBITION; SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

LA FOLLETTE, JOHNSON, SCHROETER & DEHAAS
GABRIELE PRATER
Suite 2600 Equitable Plaza
3435 Wilshire Boulevard
Los Angeles, California 90010
(213) 380-3131

Attorneys for Petitioner
Southern Pacific Transportation Company

APPENDIX E

TABLE OF AUTHORITIES CITED

Cases **Page**

Statutes

United States Constitution

INDEX

2 Civ. 53635

In the Court of Appeal of the State of California

SECOND APPELLATE DISTRICT

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Petitioner,

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Respondent,

GORDON McDOWELL and
MRS. PATSY D. McDOWELL,

Real Parties in Interest.

PETITION FOR WRIT OF MANDATE, OR IN THE ALTERNATIVE, A WRIT OF PROHIBITION; SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

Petitioner, SOUTHERN PACIFIC TRANSPORTATION COMPANY, petitions this Court for Writ of Mandate, or, in the alternative, a Writ of Prohibition directed to Respondent, THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, and by this verified Petition alleges:

1. BENEFICIAL INTEREST OF PETITIONER; CAPACITY OF RESPONDENT AND REAL PARTIES IN INTEREST.

Petitioner, SOUTHERN PACIFIC TRANSPORTATION COMPANY, is a defendant in an action now pending in Respondent Court, entitled *Gordon McDowell and Mrs. Patsy D. McDowell vs. Southern Pacific Transportation Company, et al.*, Case No. C 219263. Plaintiffs, Gordon McDowell and Patsy D. McDowell, are named in this Petition as the Real Parties in Interest.

2. STATEMENT OF FACTS

On November 4, 1977 the Real Parties in Interest filed a Complaint for personal injuries under the Federal Employers' Liability Act against Petitioner. (A copy of said Complaint is attached hereto as Exhibit A.) The Complaint alleged that plaintiff, GORDON McDOWELL, had suffered injury while acting in the course of employment for Petitioner due to Petitioner's negligence, specifically that he was injured by a locomotive while attempting to board it. As a third cause of action, plaintiff, PATSY D. McDOWELL, sought damages for loss of consortium due to her husband's injury.

On or about January 3, 1978, Petitioner filed a Demurrer to said third cause of action. Said Demurrer was based on the grounds that loss of consortium is not recoverable under the Federal Employers' Liability Act, that the remedy under said Act is exclusive and supersedes state and common law. (A copy of said Demurrer is attached hereto as Exhibit B).

The Real Parties in Interest filed opposing papers to Petitioner's Demurrer in which they maintained that the Federal Employers' Liability Act has been construed to permit a loss of consortium recovery because such recovery had been granted to the spouses of injured seamen

bringing suit under the Jones Act which incorporates FELA. (A copy of said Opposition is attached hereto as Exhibit C.)

After receiving said opposition, Petitioner filed a Supplemental Memorandum of Points and Authorities addressing itself specifically to the legal theory expressed by the Real Parties in Interest. (A copy of said Supplemental Points and Authorities is attached hereto as Exhibit D.)

The Demurrer came on for hearing before the Honorable Richard F.C. Hayden who had not reviewed Petitioner's Supplemental Brief and who overruled the Demurrer. Petitioner filed a Motion for Rehearing of said Demurrer based on the grounds that the significant legal issues presented in Petitioner's Supplemental Brief had not been judicially considered prior to the ruling. Petitioner concurrently filed additional Points and Authorities (attached hereto as Exhibit E) again emphasizing the exclusivity of remedies under FELA, to which Real Parties in Interest replied by an opposing Memorandum (Exhibit F attached hereto).

Petitioner's Motion for Reconsideration was heard on February 17, 1978 before the Honorable Richard F.C. Hayden who at that time asked both counsel to prepare and submit to the Court further briefs regarding the relationship between the Jones Act and the Federal Employers' Liability Act as it applies to a loss of consortium action. The Real Parties in Interest consequently submitted a brief in which they restated their contention that a loss of consortium recovery is permissible under the Federal Employers' Liability Act by implication since such recovery has been granted to injured seamen apparently under the Jones Act which incorporates FELA. (A copy of said Points and Authorities is attached as Exhibit G.)

Petitioner submitted its Supplemental Brief to the Court in which it traced the construction of FELA by the United States Supreme Court since its enactment. It was brought to the attention of the Court that for constitutional reasons, FELA is never incorporated into the Jones Act where its incorporation would have the effect of restricting remedies available to seamen under general maritime law, and further, that the decisions cited by the Real Parties in Interest granting a loss of consortium recovery in maritime cases are based on a construction of general maritime law and not a construction of the Jones Act. FELA is, therefore, not affected by the decisions in said maritime cases. (A copy of said Supplemental Memorandum of Points and Authorities is attached as Exhibit H.)

On March 17, 1978, the Honorable Richard F.C. Hayden reheard the Demurrer to the third cause of action for loss of consortium and sustained the same. During oral argument the Honorable Court expressed that after a more careful review of the issues it was his conclusion that no loss of consortium action is permissible under the Federal Employers' Liability Act pursuant to existing law. The Court gave the Real Parties in Interest thirty (30) days to file an Amended Complaint.

On or about March 20, 1978, the Real Parties in Interest filed the First Amended Complaint. (A copy of said Complaint is attached hereto as Exhibit I.) Said First Amended Complaint reiterated the third cause of action for loss of consortium under the Federal Employers' Liability Act, and further added a new, fourth, cause of action, also for loss of consortium, ostensibly based on a common law theory. Petitioner demurred to said third and fourth causes of action on the grounds as before, of exclusivity of the remedy under FELA and its superseding effect over state and common law. (A copy of said Points and Authorities is attached hereto as Exhibit J.)

The Real Parties in Interest opposed said Demurrer (a copy of which Opposition is attached as Exhibit K) and Petitioner, upon receipt of said Opposition, filed a Supplemental Brief with the Court (Exhibit L attached hereto). The Court, on April 5, 1978, heard argument on the issues presented and took the matter under submission.

3. RESPONDENT'S RULING

Respondent, The Honorable Commissioner Jeff Whitehill, Judge Pro Tem, issued a Minute Order which was mailed to and received by Petitioner on April 12, 1978, in which he overruled the Demurrers as to the third and fourth causes of action.

4. PETITIONER'S CONTENTIONS FOR BASIS OF RELIEF

The above-described action of Respondent is wholly invalid and in excess of the Court's jurisdiction. The Respondent Court exceeded its judicial powers by allowing a cause of action that is precluded by statutory and case law. The Honorable Court is bound to follow the construction of the Federal Employers' Liability Act as set out by the United States Supreme Court and the Federal Appellate Courts. It is not the proper role and function of a court hearing Law and Motion matters to create a new cause of action where none exists under established statutory and case law.

5. ABSENCE OF OTHER REMEDIES

Petitioner has no plain, speedy and adequate remedy at law from the Order of April 10, 1978 other than the relief sought in this Petition. Mandamus or Prohibition are the only remedies available to obtain review of Respondent's Order because the challenged Order is not a final judgment or otherwise appealable under the provisions of Section 904.1 of the *California Code of Civil Procedure.*

If the above-described Court is not compelled to vacate its order overruling Petitioner's Demurrers or, in the alternative, prohibited from permitting said third and fourth causes of action to remain a part of the present suit, Petitioner will be irreparably injured in that it will be required to defend against improper causes of action.

6. POINTS AND AUTHORITIES INCLUDED HEREIN

By reference the accompanying Memorandum of Points and Authorities is made a part of this Petition.

7. PRAYER

WHEREFORE, Petitioner prays for the following relief:

(1) An Alternative Writ of Mandate directing respondent to vacate its Order of April 10, 1978, and to issue an Order sustaining Petitioner's Demurrers, or to show cause before this Court why it should not be required to do so;

(2) A peremptory Writ of Mandate directing Respondent to vacate its Order of April 10, 1978, and to issue an Order sustaining Petitioner's Demurrers;

(3) Or, in the alternative, a Writ of Prohibition prohibiting Respondent from exceeding its jurisdiction by its Order overruling Petitioner's Demurrers;

(4) For costs of suit incurred herein; and

(5) For such other and further relief as the Court may deem proper.

DATED: May 11, 1978.

LA FOLLETTE, JOHNSON, SCHROETER & DEHAAS

By_____

Gabriele M. Prater

Attorneys for Defendant

SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Corporation

VERIFICATION

I, the undersigned, declare:

I am one of the attorneys for Petitioner, SOUTHERN PACIFIC TRANSPORTATION COMPANY, in the action before the Court.

I have read the foregoing Petition for Writ of Mandate, or, in the alternative, Writ of Prohibition, and know the contents thereof and that the same are true based upon my own knowledge and upon knowledge obtained from the various Departments of Petitioner, and as to those matters I believe them to be true.

I declare that I am authorized to file this Petition on behalf of Petitioner, SOUTHERN PACIFIC TRANSPORTATION COMPANY.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 11th day of May, 1978, at Los Angeles, California.

Gabriele Prater
Attorneys for Petitioner
SOUTHERN PACIFIC
TRANSPORTATION COMPANY

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDATE, OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION

I
RESPONDENT'S ORDER IS NOT DIRECTLY APPEALABLE AND MANDAMUS OR PROHIBITION ARE PROPER REMEDIES TO REVIEW SUCH ORDER.

Respondent's Order overruling Petitioner's Demurrers is a non-appealable Order.

California Code of Civil Procedure, Section 904.1;

Board of Trustees of Compton Junior College District, Los Angeles County v. Stubblefield (1971) 16 Cal. App.3d 820, 822.

Mandamus may issue to vacate an Order made by the Court in an abuse of discretion.

State Farm Mutual Automobile Insurance Company v. Superior Court of the City and County of San Francisco (1956) 47 Cal.2d 428, 432;

City of San Jose v. Superior Court of Santa Clara County (1974) 12 Cal.3d 447.

Prohibition may issue to prevent enforcement of an invalid order.

Holm v. Superior Court (1954) 42 Cal.2d 500, 505.

II
THE FEDERAL EMPLOYERS' LIABILITY ACT SUPERSEDES THE COMMON LAW AND STATE LAWS AND THE REMEDY UNDER THE ACT IS EXCLUSIVE OF ALL OTHERS.

Article 1, Section 8, Clause 3 of the United States Constitution provides that:

> "Congress shall have power . . . to regulate commerce with foreign nations, and among the several states . . . "

Congress enacted the Federal Employers' Liability Act to define what rights of action injured railroad employees may assert against their employers engaged in interstate commerce and to control the extent of liability railroad carriers are subject to. By doing so, Congress has *preempted the field* of rights and remedies available to injured railroad employees against their employers. This was recognized by the California Supreme Court in *Davee v. Southern Pacific Company* (1962) 58 Cal.2d 572, 576, in which the Court held as follows:

> "By the Federal Employers' Liability Act, Congress *took possession of the field of employers liability* to employees in interstate transportation by rail; and all state laws upon that subject were superseded."

It is furthermore established law in California that in actions brought in state court where the Federal Employers' Liability Act applies, the substantive law is laid down by Federal Courts and particularly the United States Supreme Court is controlling, state courts being bound by their decisions.

Anderson v. Achinson (1947) 31 C.2d 117, reversed on other grounds (misinterpretating rights and remedies available under the Act) 333 U.S. 821.

Weiand v. Southern Pac. Co. (1939) 34 C.A.2d 500, 504.

King v. Schumacher (1939) 32 C.A.2d 172, 173.

The Complaints in the present case alleges that plaintiff, Gordon McDowell, was injured while acting in the course and scope of his employment with Petitioner. The Federal Employers' Liability Act and its construction by Federal Courts, therefore control the rights and remedies available to those suing for his injuries, as well as the extent of liability that the railroad carrier is subject to.

III
LOSS OF CONSORTIUM IS NOT RECOVERABLE UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT EVEN WHERE IT IS ASSERTED AS A SEPARATE AND DISTINCT CAUSE OF ACTION ON A COMMON LAW THEORY.

Real Parties in Interest maintain that their cause of action for loss of consortium is permissible because it is asserted as a separate right of recovery under state and common law. To the contary, the Federal Employers' Liability Act supersedes state and common law and has been consistently interpreted by the United States Supreme Court and numerous Federal Courts not to permit such loss of consortium recovery.

The precise issue presented here was treated by the United States Supreme Court in the classic case of *New York Central and Hudson River Railroad v. Tonsellito* (1917) 244 U.S. 360, 37 S.Ct. 620, in which the father of a minor injured railroad employee sought recovery for loss

of the son's services.

As in the present case, plaintiff, in *Tonsellito,* based his alleged right of recovery on an independent cause of action existing under common law, which he asserted was not extinguished by FELA. The Court disagreed as follows:

> "The court of errors and appeals ruled, and it is now maintained, that the right of action asserted by the father existed at common law and was not taken away by the Federal Employers' Liability Act. But the contrary view, we think, is clearly settled by our recent opinions in *New York C. etc. R. Co. v. Winfield,* 244 U.S. 147 . . . and *Erie R. Co. v. Winfield,* 244 U.S. 170 . . . There we held the act 'is comprehensive and also exclusive' in respect of a railroad's liability for injuries suffered by its employees while engaging in interstate commerce. 'It establishes a rule or regulation which is intended to operate iniformly in all the states as respects interstate commerce, and in that field it is both paramount and exclusive.'
>
> *Congress having declared when, how far, and to whom carriers shall be liable on account of accidents in this specified class, such liability can neither be extended nor abridged by common or statutory law of the state."* (at page 621; emphasis added)

The *Tonsellito* decision, which is controlling today, clearly sets forth that actions by a relative of the injured railroad employee for loss of services and society are precluded *even if they are alleged as independent causes of action.*

Federal Appellate Courts have consistently followed the *Tonsellito* interpretation of FELA and have denied loss of consortium actions.

Jess v. Great Northern Railway Company (9th Cir. 1968 401 F.2d 535;

Anderson v. Burlington Northern, Inc. (10th Cir. 1972) 469 F.2d 288;

Sarik v. Pennsylvania Railroad Company (W.D. Penn.,1946) 68 Fed.Supp. 630;

Greethurst v. Bethlehem Steel Corporation (N.D. Ind., 1974) 380 Fed.Supp. 638.

State Courts have consistently followed the Federal interpretation of FELA and have denied loss of consortium actions.

Spinola v. New York Central Railroad (1969) 305 N.Y.Supp.2d 437;

Howes v. Baker (1973) 305 N.E.2d 689;

Kinney v. Southern Pacific (1962) 232 Oregon 322, 375 Pacific 2d 418;

Devine v. Southern Pacific Railroad (1956) 207 Oregon 261, 295 Pacific 2d 201.

In *Jess,* supra, the wife not only alleged an independent cause of action for loss of consortium, as Real Parties in Interest do here, but brought a separate, subsequent lawsuit against the railroad. The Ninth Circuit Court of Appeal struck down such cause of action, reiterating the principles set out in *Tonsellito*:

> "The Federal Employers' Liability Act not only provides exclusive remedy for recovery by an employee of damages sustained by him as a result of an injury to him, *but also governs recovery by others for damages resulting from*

such injury." (at page 536; emphasis added)

In *Sarik,* supra, the husband of an injured employee asserted a loss of consortium cause of action based on his common law right to such action. The Court overruled said cause of action:

> *"It has been definitely held that the Federal Employers' Liability Act takes away any common law right to recover.* It is 'comprehensive and also exclusive', . . . (citing *New York Central and Hudson River Railroad Company v. Tonsellito)."* (at page 631; emphasis added)

It follows that under the existing construction of the Federal Employers' Liability Act by the United States Supreme Court and the Federal Appellate Courts, no loss of consortium action may be maintained even when such right exists under state or common law. California State Courts are bound by said interpretation of FELA, and the Respondent Court exceeded its jurisdiction by granting such cause of action against all legal authority.

IV
THE CONSTRUCTION OF THE FEDERAL EMPLOYERS' LIABILITY ACT AS DENYING A LOSS OF CONSORTIUM RECOVERY IS NOT AFFECTED BY DECISIONS GRANTING SUCH RECOVERY IN MARITIME CASES.

Real Parties in Interest furthermore maintain that the Federal Employers' Liability Act has been construed to permit loss of consortium recovery by virtue of the fact that such recovery has been granted in certain maritime cases. Real Parties in Interest argue that because the terms of FELA are incorporatd into the Jones Act which applies to Seamen and because certain cases have granted loss of consortium recoveries to Seamen, FELA permits a loss of

consortium recovery by implication.

It must be emphasized that the Jones Act was designed to *expand* Seamen's rights in those areas where general maritime law does not provide a remedy — *it is never applied where it would cut off a remedy available under a construction of maritime law.*

In construing the Jones Act shortly after its enactment, Justice Stone stated, in the case of *Panama Railroad Co. v. Johnson* (1923) 264 U.S. 375, that the Jones Act merely *added* new remedies to the maritime law and was not an attempt to create an exclusive remedy for maritime torts. The statute interposes no obstacle to *"rights founded on the maritime law or an admissible construction thereof."* (at page 388; emphasis added)

The Court, in *Panama Railroad,* supra, also recognized that in order to save the Jones Act from "grave" constitutional objections, it was necessary to interpret it as providing coexsisting rather than exclusive remedies. Maritime law is *constitutionally* based, and mere legislation, even if federal, may not override such constitutionally based remedies. Federal legislation may, of course, limit remedies available to railroad employees under common law or state law because federal law supersedes state law.

The same interpretation of the Jones Act was given in *Arizona v. Anelich,* (1936) 298 U.S. 110, 123, 56 SCT 707, and *Beadle v. Spencer,* (1936) 298 U.S. 124, 56 SCt 712, in which the Courts emphasized that the purpose of the Jones Act was to "enlarge" the protection of seamen and not to narrow rights granted seamen by the maritime law.

Upon examination of the cases upon which the Real Parties in Interest rely in support of their proposition, it becomes readily apparent that these cases grant a cause of

action for loss of consortium based on a construction of the *general maritime law, not* on a construction of the Jones Act.

In *Sealand Services, Inc. v. Gaudet* (1974) 414 U.S. 573, on which Real Parties in Interest heavily rely, the Court recognized a wife's loss of consortium action, but it did so based on its construction of general maritime law *not* of the Jones Act. The Court reasoned as follows:

> "... in any event our decision is compelled if we are to shape the remedy to comport with the *humanitarian policy of the maritime law* to show 'special solicitude' for those who are injured within its jurisdiction." (at page 578; emphasis added)

The case of *Skidmore v. Grueninger* (5th Cir. 1975) 506 F.2d 716, cited by Real Parties in Interest, correctly interpreted the *Sealand* decision as permitting loss of consortium under general maritime law.

In the case of *Pesce v. Summa Corp.* (1975) 54 C.A.3d 86, on which Real Parties in Interest heavily rely, the Court permitted the spouse of an injured longshoreman recovery under general maritime law for loss of consortium of her husband caused by the neglience of the shipowner. Any recovery which the spouse was permitted to make in the *Pesce* decision was under the terms of the general maritime law. Nowhere in the *Pesce* decision does the Court place reliance on the terms of the Jones Act or FELA as a means of permitting the spouse to maintain her cause of action for loss of consortium.

Equally, in the 1976 case of *Lemon v. Bank Lines, Ltd.*, 411 F.Supp. 677, the "... basis for plaintif's action for loss of consortium was *maritime tort which [is] constitutionally based...* " [Emphasis added]. The Court ruled that the "spouse of injured longshoreman may

recover under general maritime law for loss of consortium of her husband caused by negligence of shipowner."

The decisions granting loss of consortium in maritime cases represent a construction of the general maritime law which co-exists with the remedies provided under the Jones Act. Since these do not construe the Jones Act, they do not, by implication, construe the Federal Employers' Liability Act and consequently have no relevancy to cases involving railroad employees suing under FELA. Real Parties in Interest failed to cite Respondent Court to a single authority granting loss of consortium under a construction of the Jones Act, let alone FELA. Nevertheless, Respondent Court granted such cause of action.

V

CONCLUSION

It is respectfully submited that the holding in *Tonsellito*, supra, followed by *Jess*, supra, and other Federal Appellate and State Court cases as cited above denying a loss of consortium cause of action where FELA is involved is the controlling authority on the issue before the Court and is binding on Respondent Court as well as all other State Courts.

For that reason, Petitioner herein respectfully requests that this Honorable Court issue an alternative or peremptory Writ of Mandate, or, in the alternative, a Writ of Prohibition, and grant the further prayer for relief of Petitioner herein as set forth in its Petition.

Respectfully submitted,

LA FOLLETTE, JOHNSON, SCHROETER
& DEHAAS

By _____
Gabriele M. Prater
Attorneys for Defendant
SOUTHERN PACIFIC TRANSPORTATION
COMPANY, a Corporation

2 Civ. 53635

In the Court of Appeal of the State of California

SECOND APPELLATE DISTRICT

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Petitioner,

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Respondent,

GORDON McDOWELL and
MRS. PATSY D. McDOWELL,

Real Parties in Interest.

PETITION FOR HEARING

LA FOLLETTE, JOHNSON, SCHROETER & DEHAAS
GABRIELE PRATER
Suite 2600 Equitable Plaza
3435 Wilshire Boulevard
Los Angeles, California 90010
(213) 380-3131

Attorneys for Petitioner
Southern Pacific Transportation Company

APPENDIX F

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Statutes

United States Constitution

In the Supreme Court of the United States

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Respondent.

GORDON MCDOWELL and MRS. PATSY D. MCDOWELL,

Real Parties in Interest.

PETITION FOR HEARING

TO THE HONORABLE CHIEF JUSTICE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioner, SOUTHERN PACIFIC TRANSPORTATION COMPANY, petitions this Court for a hearing following the denial of a Writ of Mandate, or in the alternative, Writ of Prohibition, filed on June 8, 1978 by the Court of Appeal, Second Appellate District, which denial let stand an Order of the Los Angeles Superior Court overruling Petitioner's

Demurrer to Real Parties' in Interest cause of action in loss of consortium alleged under the Federal Employers' Liability Act. A hearing is necessary to settle important questions of law of first impression in California.

STATEMENT OF FACTS

Petitioner, SOUTHERN PACIFIC TRANSPORTATION COMPANY, is a defendant in an action now pending in Respondent Court, entitled *Gordon McDowell and Mrs. Patsy D. McDowell v. Southern Pacific Transportation Company, et al.,* Case No. C 219263. Plaintiffs, Gordon McDowell and Patsy D. McDowell, are named in this Petition as the Real parties in Interest.

On November 4, 1977, the Real Parties in Interest filed a Complaint for personal injuries under the Federal Employers' Liability Act against Petitioner. The Complaint alleged that plaintiff, GORDON McDOWELL had suffered injury while acting in the course of employment for Petitioner due to Petitioner's negligence, specifically that he was injured by a locomotive while attempting to board it. As a third cause of action, plaintiff, PATSY D. McDOWELL sought damages for loss of consortium due to her husband's injury.

On or about January 3, 1978, Petitioner filed a Demurrer to said third cause of action. Said Demurrer was based on the grounds that loss of consortium is not recoverable under the Federal Employers' Liability Act, that the remedy under said Act is exclusive and supersedes state and common law.

The Real Parties in Interest filed opposing papers to Petitioner's Demurrer in which they maintained that the Federal Employers' Liability Act has been construed to permit a loss of consortium recovery because such recovery had been granted to the spouses of injured seamen

bringing suit under the Jones Act which incorporates FELA.

After receiving said opposition, Petitioner filed a Supplemental Memorandum of Points and Authorities addressing itself specifically to the legal theory expressed by the Real Parties in Interest.

The Demurrer came on for hearing before the Honorable Richard F.C. Hayden who had not reviewed Petitioner's Supplemental Brief and who overruled the Demurr. Petitioner filed a Motion for Rehearing of said Demurrer based on the grounds that the significant legal issues presented in Petitioner's Supplemental Brief had not been judicially considered prior to the ruling. Petitioner concurrently filed additional Points and Authorities again emphasizing the exclusivity of remedies under FELA, to which Real Parties in Interest replied by an opposing Memorandum.

Petitioner's Motion for Reconsideration was heard on February 17, 1978 before the Honorable Richard F.C. Hayden who at that time asked both counsel to prepare and submit to the Court further briefs regarding the relationship between the Jones Act and the Federal Employers' Liability Act as it applies to a loss of consortium action. The Real Parties in Interest consequently submitted a brief in which they restated their contention that a loss of consortium recovery is permissible under the Federal Employers' Liability Act by Implication since such recovery has been granted to injured seamen apparently under the Jones Act which incorporates FELA.

Petitioner submitted its Supplemental Brief to the Court in which it traced the construction of FELA by the United States Supreme Court since its enactment. It was brought to the attention of the Court that for constitutional

reasons, FELA is never incorporated into the Jones Act where its corporation would have the effect of restricting remedies available to seamen under general maritime law, and further, that the decisions cited by the Real Parties in Interest granting a loss of consortium recovery in maritime cases are based on a construction of general maritime law and not a construction of the Jones Act. FELA is, therefore, not affected by the decisions in said maritime cases.

On March 17, 1978, the Honorable Richard F.C. Hayden reheard the Demurrer to the third cause of action for loss of consortium and sustained the same. During oral argument the Honorable Court expressed that after a more careful review of the issues, it was his conclusion that no loss of consortium action is permissible under the Federal Employers' Liability Act pursuant to existing law. The court gave the Real Parties in Interest filed the First Amended Complaint. Said First Amended Complaint reiterated the third cause of action for loss of consortium under the Federal Employers' Liability Act, and further added a new, fourth cause of action, also for loss of consortium, ostensibly based on a common law theory. Petitioner demurred to said third and fourth causes of action on the grounds as before, of exclusivity of the remedy under FELA and its superseding effect over state and common law.

The Real Parties in Interest opposed said Demurrer and Petitioner, upon receipt of said Opposition, filed a Supplemental Brief with the Court. The Court, on April 5, 1978, heard argument on the issues presented and took the matter under submission.

Respondent, the Honorable Commissioner Jeff Whitehill, Judge Pro Tem, issued a Minute Order which was mailed to and received by Petitioner on April 12, 1978, in which he overruled the Demurrers as to the third

and fourth causes of action.

The above-described action of Respondent is wholly invalid and in excess of the Court's jurisdiction. The Respondent Court exceeded its judicial powers by allowing a cause of action that is precluded by statutory and case law. The Honorable Court is bound to follow the construction of the Federal Employers' Liability Act as set out by the United States Supreme Court and the Federal Appellate Courts. It is not the proper role and function of a court hearing Law and Motion matters to create a new cause of action where none exists under established statutory and case law.

ARGUMENT

I

THE FEDERAL EMPLOYERS' LIABILITY ACT SUPERSEDES THE COMMON LAW AND STATE LAWS AND THE REMEDY UNDER THE ACT IS EXCLUSIVE OF ALL OTHERS.

Article 1, Section 8, Clause 3 of the United States Consitution provides that:

> "Congress shall have power. . . to regulate commerce with foreign nations, and among the several states. . . "

Congress enacted the Federal Employers' Liability Act to define what rights of action injured railroad employees may assert against their employers engaged in interstate commerce and to control the extent of liability railroad carriers are subject to. By doing so, Congress has preempted the field of rights and remedies available to injured railroad employees against their employers. This was recognized by the California Supreme Court in *Davee v. Southern Pacific Company* (1962) 58 Cal.2d 572, 576, in which

the Court held as follows:

> "By the Federal Employers' Liability Act, Congress *took possession of the field of employers' liability* to employees in interstate transportation by rail; and all state laws upon that subject were supersedes."

It is furthermore established law in California that in actions brought in state court where the Federal Employers' Liability Act applies, the substantive law as laid down by Federal Courts and particularly the United States Supreme Court is controlling, state courts being bound by their decisions.

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King v. Schumacher (1939) 32 Cal.2d 172, 173.

The Complaint in the present case alleges that plaintiff, Gordon McDowell, was injured while acting in the course and scope of his employment with Petitioner. The Federal Employers' Liability Act and its construction by Federal Courts, therefore controls the rights and remedies available to those suing for his injuries, as well as the extent of liability that the railroad carrier is subject to.

II

LOSS OF CONSORTIUM IS NOT RECOVERABLE UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT EVEN WHERE IT IS ASSERTED AS A SEPARATE AND DISTINCT CAUSE OF ACTION ON A COMMON LAW THEORY.

Real Parties in Interest maintain that their cause of action for loss of consortium is permissible because it is asserted as a seperate right of recovery under state and common law. To the contrary, the Federal Employers' Liability Act supersedes state and common law and has been consistently interpreted by the United States Supreme Court and numerous Federal Appellate Courts not to permit such loss of consortium recovery.

The precise issue presented here was treated by the United States Supreme Court in the classic case of *New York Central and Hudson River Railroad v. Tonsellito* (1917) 244 U.S. 360, 37 SCt 620, in which the father of a minor injured railroad employee sought recovery for loss of the son's services.

As in the present case, plaintiff, in *Tonsellito,* based his alleged right of recovery on an independent cause of action existing under common law, which he asserted was not extinguished by FELA. The Court disagreed as follows:

> "The court of errors and appeals ruled, and it is now maintained, that the right of action asserted by the father existed at common law and was not taken away by the Federal Employers' Liability Act. But the contrary view, we think, is clearly settled by our recent opinions in *New York C. etc. R. Co. v. Winfield,* 244 U.S. 147 . . . and *Erie R. Co. v. Winfield,* 244 U.S. 170 . . . *There*

> *we held the act 'is comprehensive and also exclusive' in respect of the railroad's liability for injuries suffered by its employees while engaging in interstate commerce.* 'It establishes a rule or regulation which is intended to operate uniformly in all the states as respects interstate commerce, and in that field it is both paramount and exclusive.'
> *Congress having declared when, how far, and to whom carriers shall be liable on account of accidents in this specified class, such liability can neither be extended nor abridged by common or statutory laws of the state."* (at page 621; emphasis added)

The *Tonsellito* decision, which is controlling today, clearly sets forth that actions by a relative of the injured railroad employee for loss of services and society are precluded *even if they are alleged as independent causes of action.*

Federal Appellate Courts have consistently followed the *Tonsellito* interpretation of FELA and have denied loss of consortium actions.

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> "The Federal Employers' Liability Act not only provides exclusive remedy for recovery by an employee of damages sustained by him as a result of an injury to him, *but also governs recovery by others for damages resulting from such injury."* (at page 536; emphasis added)

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> *"It has been definitely held that the Federal Employers' Liability Act takes away any common law right to recover.* It is 'comprehensive and also exclusive,' . . . (citing *New York Central and Hudson River Railroad Company v. Tonsellito*)." (at page 631; emphasis added)

It follows that under the existing construction of the Federal Employers' Liability Act by the United States Supreme Court and the Federal Appellate Courts, no loss

of consortium action may be maintained even when such right exists under state or common law. California State Courts are bound by said interpretation of FELA, and the Respondent Court exceeded its jurisdiction by granting such cause of action against all legal authority.

III

THE CONSTRUCTION OF THE FEDERAL EMPLOYERS' LIABILITY ACT AS DENYING A LOSS OF CONSORTIUM RECOVERY IS NOT AFFECTED BY DECISIONS GRANTING SUCH RECOVERY IN MARITIME CASES.

Real Parties in Interest furthermore maintain that the Federal Employers' Liability Act has been construed to permit loss of consortium recovery by virtue of the fact that such recovery has been granted in certain maritime cases. Real Parties in Interest argue that because the terms of FELA are incorporated into the Jones Act which applies to seamen and because certain cases have granted loss of consortium recoveries to seamen, FELA permits a loss of consortium recovery by implication.

It must be emphasized that the Jones Act was designed to *expand* seamen's rights in those areas where general maritime law does not provide a remedy — *it is never applied where it would cut off a remedy available under a construction of maritime law.*

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The Court, in *Panama Railroad, supra,* also recognized that in order to save the Jones Act from "grave" constitutional objections, it was necessary to interpret it as providing coexisting rather than exclusive remedies. Maritime law is *constitutionally based*, and mere legislation, even if federal, may not override such constitutionally based remedies. Federal legislation may, of course, limit remedies available to railroad employees under common law or state law because federal law supersedes state law.

The same interpretation of the Jones Act was given in *Arizona v. Anelich*, (1936) 298 U.S. 110, 123, 56 S.Ct. 707, and *Beadle v. Spencer*, (1936) 298 U.S. 124, 56 S.Ct. 712, in which the Courts emphasized that the purpose of the Jones Act was to "enlarge" the protection of seamen and not to narrow rights granted seamen by the maritime law.

Upon examination of the cases upon which the Real Parties in Interest rely in support of their proposition, it becomes readily apparent that these cases grant a cause of action for loss of consortium based on a construction of the *general maritime law, not* on a construction of the Jones Act.

In *Sealand Services, Inc. v. Gaudet* (1974) 414 U.S. 573, on which Real Parties in Interest heavily rely, the Court recognized a wife's loss of consortium action, but it did so based on its construction of general maritime law *not* of the Jones Act. The Court reasoned as follows:

> " . . . in any event our decision is compelled if we are to shape the remedy to comport with the *humanitarian policy of the maritime law* to show 'special solicitude' for those who are injured within its jurisdiction." (at page 578; emphasis added)

The case of *Skidmore v. Grueninger* (5th Cir. 1975) 506 F.2d 716, cited by Real Parties in Interest, correctly interpreted the *Sealand* decision as permitting loss of consortium under general maritime law.

In the case of *Pesce v. Summa Corp.* (1975) 54 Cal. App.3d 86, on which Real Parties in Interest heavily rely, the Court permitted the spouse of an injured longshoreman recovery under general maritime law for loss of consortium of her husband caused by the negligence of the shipowner. Any recovery which the spouse was permitted to make in the *Pesce* decision was under the terms of the general maritime law. Nowhere in the *Pesce* decision does the Court place reliance on the terms of the Jones Act or FELA as a means of permitting the spouse to maintain her cause of action for loss of consortium.

Equally, in the 1976 case of *Lemon v. Bank Lines, Ltd., 411 F.Supp. 677, the " . . . basis for plaintiff's action for loss of consortium was maritime tort which [is] constitutionally based . . . "* (Emphasis added). The Court ruled that the "spouse of injured longshoreman may recover under general maritime law for loss of consortium of her husband caused by negligence of shipowner."

The decisions granting loss of consortium in maritime cases represent a construction of the general maritime law which co-exists with the remedies provided under the Jones Act. Since these decisions do not construe the Jones Act, they do not, by implication, construe the Federal Employers' Liability Act and consequently have no relevancy to cases involving railroad employees suing under FELA. Real Parties in Interest failed to cite Respondent Court to a single authority granting loss of consortium under a construction of the Jones Act, let alone FELA. Nevertheless, Respondent Court granted such cause of action.

IV

CONCLUSION

It is respectfully submitted that the holding in *Tonsellito, supra,* followed by *Jess, supra,* and other Federal Appellate and State Court cases as cited above denying a loss of consortium cause of action where FELA is involved is the controlling authority on the issue before the Court and is binding on Respondent Court as well as all other State Courts.

For that reason, Petitioner herein respectfully requests that this Honorable Court grant the instant Petition for Hearing and that the Order of Respondent Court overruling Petitioner's Demurrer be vacated.

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